No. 80-1354

Office-Supreme Court, U.S.
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ALEXANDER L. STEVAS,

In The

Supreme Court of the United States

OCTOBER TERM, 1980

INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS, LOCAL 241, AFL-CIO,
PETITIONER

-VS-

ASSOCIATION OF SCIENTISTS AND PROFESSIONAL ENGINERRING PERSONNEL

-AND-

RCA CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED FOR REVIEW

When a work assignment dispute between a union and an employer has been submitted to bi-partite arbitration and the arbitrator has issued an award resolving the dispute, should a District Court vacate the arbitration award and order tri-partite arbitration at the request of a second union and the employer?

LIST OF PARTIES INVOLVED

Pursuant to the Rules of this Court the following were parties in the court whose judgment is sought to be reviewed:

International Federation of Professional and Technical Engineers, Local 241, AFL-CIO

Association of Scientists and Professional Engineering Personnel

RCA Corporation

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit, as yet unreported, appears in the Appendix to this petition, infra. pp. 3a . The transcribed oral opinion of the United States District Court for the Eastern District of Pennsylvania, also unreported, appears at page 7a of the Appendix.

JURISDICTION

The Judgment Order of the United States Court of Appeals for the Third Circuit was issued and entered on October 8, 1980. A timely Petition for Rehearing was denied on November 14, 1980. This Petition for Certiorari was filed less than 90 days from the date of denial. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. §185(a); Labor-Management Relations Act §301(a)

STATEMENT OF THE CASE

The Association of Scientists and Professional Engineering Personnel (hereinafter ASPEP) brought an action in the United States District Court for the Eastern District of Pennsylvania seeking to enjoin Petitioner International Federation of Professional and Technical Engineers, Local 241 (hereinafter "Local 241") and the RCA Corporation (hereinafter "RCA") from proceeding with an arbitration without the participation of ASPEP. The arbitration concerned the assignment of work to members of Local 241. ASPEP alleged an interest in the work in question. Federal jurisdiction was invoked under 29 U.S.C. §185 (§301 of the Labor-Management Relations Act). There being no material facts in dispute, Local 241 and ASPEP filed Cross Motions for Summary Judgment. The District Court granted ASPEP's motion and ordered ASPEP's unconditional participation in the arbitration. Local 241 then appealed to the United States Court of Appeals for the Third Circuit which affirmed the judgment be-

low.

Local 241 and RCA are parties to collective bargaining agreements covering RCA employees in Camden and Moorestown, New Jersey. Local 241 claims that RCA is violating the collective bargaining agreements by assigning non-bargaining unit employees (i.e., members of ASPEP) to do the work of the Technical Writer and Editor, a Local 241 job classification. Though there are separate agreements for the Camden and Moorestown facilities, the contracts are almost identical and, pursuant to both agreements, bargaining unit work cannot be assigned to non-bargaining unit employees. The job description of a Technical Writer and Editor is identical in the two contracts.

The dispute was originally submitted to arbitration in 1964. At the time, the particular alleged violations were taking place at the Camden plant. At the arbitration, an agreement was reached and adopted by Arbitrator Lawrence E. Seibel as an award. The award further classified the job description in question and awarded

certain work to Local 241.

Despite the award, disputes continued to arise concerning the allocation of work at the Moorestown plant. RCA claimed that the Seibel award was limited to Camden. Local 241 sought relief by attempting to enforce the Seibel award in Federal Court but the court ordered that the remaining differences between Local 241 and RCA be resolved through a new arbitration. Local 241 then submitted the Moorestown case to arbitration.

An arbitration hearing was held before the late Dr. S. Herbert Unterberger on March 31, 1978 at which hearing Local 241 and RCA agreed that the arbitrator should first decide the threshold issue of whether the 1964 Award of Arbitrator Seibel was applicable to the Moorestown plant. Testimony was taken, a full, fair hearing was conducted, briefs were submitted and, on May 25, 1978, Dr. Unterberger issued his decision.

Unterberger held that the Seibel award was applicable to Moorestown and another hearing was convened to determine the specific application of

the contract provision, as clarified by the Seibel Award, to the specific factual circumstances at Moorestown. This reconvened hearing was scheduled for February 16, 1979. Prior to that date, ASPEP, which also has a collective bargaining agreement with RCA, had neither participated nor attempted to participate in any of the afore described proceedings; nor had RCA objected to the bi-partite nature of the proceedings to that point.

ASPEP appeared for the first time at the February 16, 1979 hearing and sought to intervene, claiming the disputed work belonged to its members. At the hearing, Local 241 informed ASPEP that it would consent to its intervention if ASPEP agreed to be bound by the awards which had already been rendered. The awards were, in effect, the determinants of the submission to the arbitrator on February 16, 1979.

ASPEP, through its counsel, informed the arbitrator and the parties that it would not agree to be bound by the prior awards. In response, Local 241 requested that the arbitration be reconvened without ASPEP's participation. A hearing

date was set, but the instant suit was filed prior to the hearing and all parties agreed to postpone the arbitration pending the outcome of this action.

On February 14, 1980, Judge Louis H. Pollak of the United States District Court for the Eastern District of Pennsylvania ordered that ASPEP be allowed to intervene and that neither ASPEP nor Local 241 and RCA were to be bound by the terms of the Seibel and Unterberger awards. The Court of Appeals affirmed this judgment.

REASONS FOR GRANTING THIS WRIT

1. THE DECISION BELOW DECIDES AN IMPORTANT QUESTION RELATING TO THE DEVELOPING FEDERAL COMMON LAW OF LABOR RELATIONS, WHICH QUESTION HAS NOT BEEN DECIDED BY THIS COURT.

   A. THE DECISION BELOW HOLDS THAT A VALID BI-PARTITE ARBITRATION AWARD MAY BE VACATED IN ORDER TO ALLOW FOR TRI-PARTITE ARBITRATION, AN IMPORTANT ISSUE YET TO BE ADDRESSED BY THIS COURT.

The concept of tri-partite arbitration of labor disputes was initiated by this Court in Transportation-Communication Employees Union v. Union Pacific R.R. Co., 385 U.S. 157, 87 S.Ct. 369 (1966). In that case, it was held that, under the Railway Labor Act, the Railroad Adjustment Board must consider the claims and interests of all interested unions before resolving a work assignment dispute. The decision, however, was based on an analysis of the Railway Labor Act and did not address the applicability of tri-partite arbitration in the context of §301 of the

Labor-Management Relations Act (hereinafter LMRA).

Subsequent to the Transportation-Communications Employees Union decision, various circuit courts extended the use of tri-partite arbitration to cases seeking to compel tri-partite proceedings under §301 of the LMRA. The seminal case was CBS, Inc. v. American Recording and Broadcasting Association, 414 F.2d 1326 (2nd Cir. 1969). The Second Circuit held that, under §301 of the LMRA, the federal courts possessed the power to order tri-partite arbitration of a work assignment dispute despite the absence of a clause in any of the relevant collective bargaining agreements specifically permitting tri-partite arbitration.

The CBS decision acknowledges that the existence of the power to order tri-partite arbitration does not resolve "whether there was a proper exercise of that power", 414 F.2d at 1329, but the opinion is virtually silent as to the factors which should be considered in making that final determination.

This Court has held that bi-partite arbi-

tration of a work assignment or jurisdictional dispute is a valid and available forum under contracts governed by §301 of the LMRA. Carey v. Westinghouse Electric Corporation, 375 U.S. 261, 84 S.Ct. 401 (1964). The Carey holding, therefore, at least implies that this Court would not apply the Transportation-Communications Employees decision to a §301 action without qualification and modification. The Transportation-Communication Employees case holds that the Railroad Adjustment Board (i.e. arbitrator) must consider and decide the claims of all interested unions in one proceeding if work assignments are at issue. Under the Railway Labor Act, the resolution of the "entire dispute" is not an option but a mandate. Carey explicitly permits bipartite arbitration, even though aspects of the dispute may remain unresolved and duplicative proceedings may result. (See concurring opinion of Justice Harlan, 375 U.S. at 273, 84 S.Ct. at 409).

Petitioner does not contend that tri-partite arbitration cannot be compelled under the LMRA,

even though this Court has yet to decide that question. The general validity of the CBS decision has been accepted by those circuits which have addressed the issue and Petitioner does not wish to challenge this judicial trend.[1]

Petitioner does suggest, however, that tri-partite arbitration should not have been compelled in the instant case and that this court should address the question of when such an order is appropriate under §301 of the LMRA. In particular, this Court should determine whether and when the desirability of tri-partite arbitration

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1. The Third Circuit explicitly acknowledges the power to order tri-partite arbitration in the instant case and, as dictum, in Winslow Glass Cutters League v. American St. Gobain Corp., 428 F.2d 353 (3rd Cir. 1970). The Ninth Circuit accepts the concept in Louisiana-Pacific Corp. v. Int'l Brotherhood of Electrical Workers Local 2294, 600 F.2d 219 (9th Cir. 1979). The Seventh Circuit compelled tri-partite resolution in Local 416, Sheet Metal Workers Int'l Assoc. v. Helgesteel Corp., 507 F.2d 1053 (7th Cir. 1974). A District Court within the Fourth Circuit followed CBS in Baltimore Typographical Union No. 12 v. A.S. Abell Co., 441 F.S. 596 (D.Md. 1977). The Tenth Circuit refers to CBS with approval in Sheet Metal Workers Int'l Assoc., Local Union 49 v. Los Alamos Constructors, Inc., 550 F.2d 1258 (10th Cir. 1977).

permits the vacating of a valid award entered under a bi-partite proceeding, as permitted in Carey.

The issue is of major significance, for if a bi-partite award concerning a work assignment can be vacated by a subsequent request for tri-partite arbitration, the Carey decision is, in effect, turned into a nullity and an unprecedented erosion of the national labor policy favoring the finality of arbitration will have been created.

Carey will become a nullity because the employer could escape any unfavorable bi-partite award by subsequently demanding a tri-partite hearing. As the union involved in the bi-partite proceeding will invariably be the union which has not been assigned the work (the union performing the work would not file a grievance), the grieving union will have no incentive for utilizing arbitration. It cannot win through a bi-partite proceeding. It can only lose.

The union would, therefore, have to seek tri-partite arbitration itself, an unappealing op-

tion, as the second union, which is already doing the work, would not want to risk its position through arbitration and the employer would have little interest in giving up its two bites at the apple, having already decided to give the work to the second union. (The unpleasant reality of this scenario is evident in the instant case, where neither the employer nor the second union made any effort to invoke a tri-partite procedure until after the petitioner obtained an arbitration ruling in its favor).

The grieving union's other option is to go on strike, so as to bring the matter before the NLRB. This is exactly the situation Carey wished to avoid. 375 U.S. at 272.

The national policy favoring the finality of an arbitrator's award will also be eroded. The concepts set forth in the Steelworker Trilogy have been the foundation of American labor relations for a generation. By creating a new basis for vacating an arbitrator's award, that basis being the employer's dissatisfaction with the result and the interests of a third party, the Third

Circuit has, in two paragraphs, tampered with a basic principle which has effectively promoted industrial peace in this country. As has been outlined above, the consequences of this change may not be salutary.

Petitioner submits that an issue of this consequence should be considered and decided by this Court.

2. THE DECISION OF THE THIRD CIRCUIT CONFLICTS WITH THE DECISIONS OF OTHER FEDERAL COURTS OF APPEALS.

The question of whether a bi-partite award should be vacated in the interests of tri-partite arbitration has been addressed by four other courts of appeals. Two of the decisions conflict directly with the Third Circuit's holding in this case.

In Louisiana-Pacific Corp. v. International Brotherhood of Electrical Workers, Local Union 2294, 600 F.2d 219 (9th Cir. 1979), the Ninth Circuit addressed a situation in which two unions claiming the same work proceeded with bi-partite arbitrations against the same employer. Both of the unions were successful and the company was obligated to pay "two different sets of employees for the work of one." 600 F.2d at 220. The company sought to set aside the awards and obtain tri-partite arbitration. The Ninth Circuit held that the policies favoring the finality of arbitration awards predominate over the policies favoring tri-partite arbitration and refused to

compel tri-partite arbitration at the expense of vacating valid bi-partite awards.

The Third Circuit asserts below that Louisiana-Pacific "does not compel a contrary result" to that reached below. Petitioner respectfully disagrees. The Third Circuit's decision below effectively vacates a valid bi-partite award and is in direct conflict with the Ninth Circuit.

In Local 771 I.A.T.S.E. v. RKO General, Inc., 546 F.2d. 1107 (2nd Cir. 1977), the Second Circuit refused to vacate a bi-partite award against a union in a work assignment case, despite the union's contention that the work assignment dispute was multilateral in nature. The Second Circuit ruled that the Union could not collaterally attack the arbitrator's award since it had freely chosen the bi-partite forum.

In the instant case, the employer never challenged the bi-partite proceeding until after the award was issued. The petitioner submits that the Third Circuit's willingness to vacate the award, despite the Employer's failure to object to bi-partite arbitration before the award was en-

tered, is in direct conflict with the Second Circuit's holding.

In Sheet Metal Workers International Assoc., Local Union No. 49 v. Los Alamos Constructors, Inc., 550 F.2d 1258 (10th Cir. 1977), the Tenth Circuit compelled tri-partite arbitration despite the existence of a bi-partite award. This case involved the distinguishing issue of whether the parties' contract actually required multilateral resolution of the dispute in question. The court held that it did.

The Tenth Circuit also rejected the union's claim that the employer had waived its right to a multilateral arbitration.

Finally, in Local 416, Sheet Metal Workers Int'l Association v. Helgesteel Corp., 507 F.2d 1053 (7th Cir. 1974), the Seventh Circuit vacated a bi-partite award issued by a Local Joint Adjustment Board and compelled multilateral resolution through a National Joint Board. As in Los Alamos, supra, the decision rested upon the conclusion that the parties' contract required the

use of the multilateral forum to resolve jurisdictional disputes.

Respectfully submitted,

MERANZE, KATZ, SPEAR & WILDERMAN
Attorneys for Petitioner

By _____
BERNARD N. KATZ

Of Counsel:

IRA SILVERSTEIN

Dated: February 10, 1981

Appendix

APPENDIX A

ORDER OF HONORABLE LOUIS H. POLLAK, J. - FILED FEBRUARY 14, 1980

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ASSOCIATION OF SCIENTISTS AND PROFESSIONAL ENGINEERING PERSONNEL	:	
V.	:	CIVIL ACTION
INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS, LOCAL 241 AFL-CIO	:	
and	:	
RCA CORPORATION	:	NO. 79-2222

O R D E R

For the reasons set forth in my opinion from the bench on February 13, 1980:

The motion of Association of Scientists and Professional Engineering Personnel for summary judgment is GRANTED.

The motion of International Federation of Professional and Technical Engineers, Local 241 AFL-CIO for summary judgment is DENIED.

The parties are ordered to continue arbitration case number 14 30 1516 77 M/J as a tri-

partite proceeding. The Association of Scientists and Professional Engineering Personnel is to be afforded the opportunity to present evidence and argument, as may be appropriate, with respect to all relevant issues, including those embraced by the 1964 Seibel award and the Unterberger interim award of May 25, 1978. Those awards shall be given such precedential weight in resolving the issues in dispute as the arbitrator deems proper.

14 February 1980 s/LHP
Louis H. Pollak

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-1379

ASSOCIATION OF SCIENTISTS AND PROFESSIONAL ENGINEERING PERSONNEL

vs.

INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS, LOCAL 241, AFL-CIO and RCA CORPORATION

International Federation of Professional and Technical Engineers, Local 241, AFL-CIO,

Appellant

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 79-2222)

Argued
October 7, 1980
Before: SEITZ, Chief Judge, and ALDISERT
and VAN DUSEN, Circuit Judges

JUDGMENT ORDER

After considering all the contentions raised by appellant, to-wit, that the district court erred in ordering tripartite arbitration without being

bound by a preliminary award of an arbitrator, and after considering the stated national labor policy providing "for the prompt and orderly settlement of all disputes," and considering this court's traditional policy encouraging arbitration, and after considering Transportation-Communication Employees Union v. Union Pacific Railroad Co., 385 U.S. 157 (1966); Window Glass Cutters League v. American St. Gobain Corp., 428 F.2d 353 (3d Cir. 1970); CBS Inc. v. American Recording & Broadcasting Ass'n, 414 F.2d 1326 (2d Cir. 1969); and having decided that Louisiana-Pacific Corp. v. IBEW Local 2294, 600 F.2d 219 (9th Cir. 1979), does not compel a contrary result, it is

ORDERED AND ADJUDGED that the judgment of the district court be and is hereby affirmed. Further, it appearing that the relief requested in the counter-claim of RCA was identical to that requested by the plaintiff, we are of the view that the district court's order constituted a final order under 28 USC §1291.

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Costs taxed against appellant.

BY THE COURT,

Seitz

Chief Judge

Attest:

s/SM

Sally Mrvos, Clerk

DATED: Oct. 8, 1980

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-1379

ASSOCIATION OF SCIENTISTS AND PROFESSIONAL ENGINEERING PERSONNEL

v.

INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS, LOCAL 241 AFL-CIO and RCA CORPORATION

International Federation of Professional and Technical Engineers, Local 241, AFL-CIO,

Appellant

PRESENT: SEITZ, Chief Judge, VAN DUSEN and ALDISERT, Circuit Judges.

ORDER

ORDERED that appellant's petition for rehearing before the original panel is hereby denied.

By the Court,

Seitz
Chief Judge

DATED: November 14, 1980

APPENDIX D

TRANSCRIPT OF ARGUMENT OF FEBRUARY 13, 1980 - FILED MARCH 12, 1980

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ASPEP,	:	CIVIL ACTION
Plaintiff,	:	
v.	:	
LOCAL 241 and RCA,	:	
Defendants.	:	NO. 79-2222

Philadelphia, Pennsylvania
February 13, 1980

BEFORE THE HONORABLE LOUIS H. POLLAK, J.

APPEARANCES:

ANTHONY DeSABATO, ESQ.,
For the Plaintiff

IRA M. SILVERSTEIN, ESQ.,
For Local 241.

JOHN H. LEDDY, ESQ.,
for RCA.

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THE COURT: I have found the arguments presented on behalf of each of the parties very helpful, indeed, and I am grateful to you. I had hoped before the argument that I would be so fully instructed that possibly I would be in a position to resolve the matter this afternoon but that didn't seem to be highly probable, considering the state of my ignorance and the substantiality of the issues, but for better or for worse, your arguments have been of a quality that they have at least led me to think that I did understand the problems that we have been talking about or at least brought me to a level of understanding which was not likely to be enhanced by further study, so that I am now in a position of feeling impertinent enough to go ahead and decide the matter. Of course, I will quickly disabuse some of you of the assumption which is the predicate of my resolving this from the bench, mainly that I do understand the matter. But I will do my best.

This case takes its origins from a dispute

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as to appropriate work assignments for certain highly technical workers in RCA in the Moorestown facility. The dispute, really, is whether certain work should be done by persons who are members of Local 241 of the International Federation of Professional and Technical Engineers or should be done by persons who are members of the Association of Scientists and Professional Engineering Personnel, the former union to be hereinafter referred to as Local 241 and the latter union to be referred to hereinafter as ASPEP.

The questions of appropriate work assignment had arisen in what at least in Local 241's view was a very closely comparable context in RCA's Camden facility many years ago and an arbitral award in an arbitration proceeding to which Local 241 and RCA were parties arising out of a collective bargaining agreement between RCA and Local 241 was determined by Arbitrator Sidell, according to a construction of that collective bargaining agreement. The question of work assignment in Camden arises, in the perception

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of Local 241, under its collective bargaining agreement governing the question of work assignment in Moorestown arises under the collective bargaining agreement between Local 241 and RCA as it governs the Moorestown facility, in Local 241's view.

In ASPEP's view, it arises under ASPEP's collective bargaining agreement with RCA governing the Moorestown facility.

An arbitration commenced I'm not sure exactly when -- perhaps in 1977, certainly by 1978 -- with a view to determining whether Local 241 was right in its claim that the Moorestown jobs in question should be assigned to it, to its personnel, its members, rather than, as in RCA's view, to outside Bargaining Unit personnel which would have meant ASPEP personnel.

Reached an interim determination in May of 1978 that, as Local 241 contended and contrary to the view taken by RCA, the so-called Sidell award construing the Camden collective bargaining agreement should, as it were, be the rule of

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law governing the very closely comparable language and so it is felt to be closely comparable problem of work allocation arising in Moorestown.

That interim determination was made by the then arbitrator, Dr. S. Herbert Unterberger, in his interim award of arbitrator dated May 25, 1978, in an arbitration proceeding in which, of course, the parties and the only parties were Local 241 and RCA.

It was then understood that the next stage of that arbitration would be to found the particular facts of the Moorestown problem within the rubric of the Sidell construction which Dr. Unterberger had adopted as the law of the case.

Matters were in that posture when, in February of 1979 at a resumed hearing of the Local 241/RCA Moorestown arbitration aspect presented itself when ASPEP asked leave to intervene, asserting its interest under its Moorestown collective bargaining agreement in protecting work assignments felt by ASPEP to be proper. Local 241 informed ASPEP that in Local 241's perspective, ASPEP would be welcome as an intervenor, pro-

vided that ASPEP accepted the prior determinations as binding. The prior determinations referred to were the original Sidell award and the interim award by Dr. Unterberger of May 25, 1978, incorporating the Sidell award into the arbitral law, as it were, of the Moorestown facility under the Local 241/RCA collective bargaining agreement.

After considering the matter for a few days ASPEP, through counsel, advised the arbitrator, Dr. Unterberger, and the parties to that arbitration, Local 241 and RCA, that it would not acquiesce in an intervention which would be under ground rules that would foreclose reexamination by the arbitrator of issues which had been determined at an earlier stage when, by definition, ASPEP had no opportunity to participate.

ASPEP then initiated this lawsuit seeking federal judicial intervention to require those parties to the arbitration and the arbitrator to permit ASPEP to intervene without limit; that is to say, without the constraints that would have

been imposed by an acceptance of the interim award of Dr. Unterberger and the Sidell award on which it relied as binding on ASPEP.

Local 241, one of the two defendants, resists ASPEP's application unless it is conditioned on substantially the ground rules which Local 241 insisted on its own initiative in February of 1979, that is to say, intervention by ASPEP limited by the prior arbitral determinations.

RCA has counterclaimed and crossclaimed. It joins in seeking an order from this Court compelling tripartite arbitration but RCA is, I was about to say, equivocal but I think the proper term is Mr. Leddy's term, neutral, with respect to whether the arbitrator should be instructed that the prior rulings Dr. Unterberger, who is now deceased, therefore would be succeeded by another arbitrator, is more remotely, Arbitrator Sidell, are to be opened for reexamination, are to be taken as binding or may be regarded as binding or open for reconsideration in the arbitrator's own independent judgment.

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The first question, so it seems to me, is whether I have jurisdiction in this lawsuit. None of the parties has really asserted that I do not have jurisdiction but I suppose that it should be taken as inviting me not to easy acquiescence but, rather, into a posture of searching skepticism that Justice Brandeis was right in asserting the first duty of courts is to do nothing. The claim of jurisdiction, if jurisdiction there be, rests on Section 301 of the Taft-Hartley Act, that is to say, ASPEP is here in the posture of asserting rights under its collective bargaining agreement with RCA as that collective bargaining agreement relates to the Moorestown facility. I think ASPEP acknowledges that it is not alleging a violation of that collective bargaining agreement as that terms is normally understood.

One might say on the face of it without alleging a violation of the collective bargaining agreement a plaintiff is in difficulty invoking Section 301 of Taft-Hartley. I think that the cases touching on this general problem make it pretty

clear that one situated as ASPEP is, one can bring a lawsuit of this sort on the basis of Section 301.

In effect, what ASPEP is doing is asserting a strong interest in protecting what it deems to be its proper contractual rights under Section 301 and the allegation is that the arbitration which is in process has a strong likelihood of producing an award which would infringe on what ASPEP believes to be its own contractual domain and, therefore, it is seeking equitable relief against RCA and Local 241 to protect against a destruction of its contractual rights.

I guess I should say parenthetically at this point that it is a position which in some sense assumes that an award, arbitral award, favorable to Local 241 would preclude an arbitral award in another proceeding favorable to ASPEP; yet I think it's common ground, at least it is now, common ground in the colloquy between Mr. DeSabato and me and it wasn't exactly controverted by any other lawyer who argued this

afternoon that conceptually it would be entirely possible for two arbitrations to go forward and result in two awards which imposed on a single employer, in this instance RCA, inconsistent obligations to the extent that those are inconsistent obligations, simply for the payment of money and presumably the employer would be in the position, though not happily, of responding to both awards.

To the extent that the awards directed the employer in different courses of action for the future with respect to the assignment of work, then very likely it certainly would be RCA's position there would have to be some device for reconciling those two inconsistent obligations, but for the moment the only point I'm making is that so long as ASPEP were not party to an arbitration which involved Local 241 and RCA, ASPEP would not, under ordinary notions of res adjudicata, be bound by any award that emerged.

I ventured into the parenthesis really by way of suggesting that one could take issue with

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ASPEP's assertion of a cause of action to prevent Local 241 and RCA from doing damage to ASPEP's asserted contractual rights under its own collective bargaining agreement but at this stage of the case it seems to me sufficient to say that ASPEP can make what in the real world is at least understandable, perhaps reasonably persuasive case that it may well be prejudiced in the subsequent protection of what it regards as its work assignment domain by an award, albeit an arbitral proceeding to which it is not a party which is assigned to another union, in this instance Local 241, the very positions that Moorestown ASPEP believes it has a stake in.

So I conclude that there is a jurisdictional base, a federal question claim assertable under Section 301 of Taft-Hartley for ASPEP's lawsuit and I emphasize that finding of jurisdiction and the cause of action to go with it in the case as initiated by ASPEP because in that sense I take issue with Mr. DeSabato's concession/assertion that ASPEP's standing in this courtroom is

strengthened, confirmed, possibly even dependent on the subsequently asserted position of RCA on the crossclaim-counterclaim calling for the relief which ASPEP has asked for in the first instance subject, of course, to the qualification that I noted before that RCA does not ask for any ground rules to be laid down as to the way the arbitration should be, tripartite arbitration should be conducted.

In what I have said I do not mean to attribute to Mr. DeSabato a legal position different from which, after all, he should be entitled to characterize. I was simply trying my best to describe a brief colloquy which we had.

In short, I think the jurisdiction and the cause of action asserted by ASPEP is closely enough analogous to the jurisdiction and cause of action recognized by the Court of Appeals for the Second Circuit in the CBS case where, to be sure, the initiating plaintiff was the corporation which feared that it would be pressed by two competing and potentially, allegedly potentially

inconsistent arbitral awards and the Second Circuit sustained the tripartite arbitration approach.

I also think that the Third Circuit's line of approach to this general range of problem as indicated in the Windowglass Cutters League case, 428 F.2d 353, which I was unfamiliar with until Mr. Leddy brought it to my attention, is, at a minimum, very strong authority for the entitlement both as to jurisdiction and cause of action of a union bringing a proceeding of this kind.

Now, having established in my view that there is authority in this Court to entertain the lawsuit at ASPEP's behest and this without regard to whether RCA took a position consistent with or antagonistic to ASPEP's view, I will turn to whether the relief ASPEP has requested is proper.

My broad judgment is that the line of cases commencing with the Supreme Court's decision in the Transportation, Communication Employees Union versus Union Pacific, 385 U.S. 157 is strongly indicative of a national labor poli-

cy which should encourage tripartite arbitration in situations of this kind. By "of this kind" I mean situations most especially characterized by jurisdictional disputes. Work assignments in which an employer finds himself beleaguered -- I don't mean this in a disparaging sense. That's the social functions which unions are to perform -- beleaguered by the competing claims of two or even more unions with which an employer has collective bargaining relationships. So I think the philosophy expressed by the Supreme Court was properly recognized by the Second Circuit in the CBS case and ought to be followed here in this Circuit and Judge Van Dusen's opinion in the Windowglass Cutters case is certainly indicative of such an attitude on the Court of Appeals.

I think Judge Teitelbaum's opinion, albeit in a somewhat different context, in a fairly recent volume of Fed. Sup. -- I may not have it -- United States Steel Workers of America versus Crane, 456 U.S. 385, is consistent with that approach.

APPENDIX D

The position of Local 241, in essence, is this: That there must be a point after which an arbitral proceeding once commenced should not be derailed by changing its character and making it tripartite. Indeed, Local 241 argues with considerable strength from the language of the Ninth Circuit's opinion in -- let me see if I do have it.

(Pause)

It's the Louisiana Pacific case in 600 F.2d 219 that this application comes far too late; if tripartite arbitration is to be pursued, it should be pursued before any bipartite arbitral proceeding has commenced.

I don't read the Second Circuit as having intended such a limitation in the CBS case, though that is as probably -- a proper description of the scenario of the CBS situation and if the Ninth Circuit meant to say that the commencement, let alone the termination, which was the fact in the Ninth Circuit, commencement of an arbitral proceeding in the bipartite phases pre-

cludes shifting its format to a tripartite one then, with all respect, I would have to differ with the Ninth Circuit.

The real question, it would seem to me, is essentially a fairly practical one of whether the -- well, let me go back. The view taken by the Ninth Circuit seems to suggest that by the time awards have been entered, they have the kind of sanctity of vestedness that prevents their being qualified by the addition of some further phase which would attempt to reconcile them.

That view, in turn, I think assumes that a tripartite arbitral proceeding has to wind up choosing sides as between the primacy of one union's claim and the total subordination of the other. I don't think that there is anything intrinsic in the momentum of the arbitral process that requires such an assumption of that uniformly has to be the result. It may very commonly be the result but the very notion of a tripartite proceeding certainly, as I think articulated by the Supreme Court, is one in which the

arbitrator is bound to consider both claims, both sets of collective bargaining relationships, the agreements relied on and the contextual history and perhaps, indeed, reach a result which a result which accommodates those varieties of interest in a way which in some instances would put more of a burden on an employer than an employer would reasonably expect to get, losing either one bipartite arbitral proceeding or another bipartite arbitral proceeding; that is to say, I don't think there is any assurance that a tripartite arbitral proceeding is, from an employer's point of view, a security blanket against liability greater than that which would be imposed under either one or the other collective bargaining agreement. But all of that is entirely speculative and I say it only by way of explaining what I perceive to be the set of expectations underlying the Ninth Circuit's approach to the question.

If we assume that there comes a point in a bipartite arbitral proceeding at which it has

matured so far that there is a quality of vestedness about what has happened which is cognate with one's entitlement to rely on the results of a judicial proceeding which has gotten to judgment, if we assume that, and I think that is an assumption that needs to be taken with considerable qualification, given all the differences between arbitration and adjudication, most notably the fact that arbitration is a process of dispute resolution which is in some substantial measure personal to the particular parties which invoke it as the very great difficulty of intervening in this very arbitral proceeding gives strong witness, but if we assume that there comes a point of vestedness in the arbitral process, I cannot see in the bipartite arbitration that has been going forward since 1977 or 1978 between Local 241 and RCA with respect to the Moorestown job that any such stage of vestedness has been arrived at.

I fully understand Local 241's interest in protecting as "law of the case or law of the

arbitration" the interim Unterberger award of May 25, 1978, but, important as that determination was, all it was was an announcement to the parties these are the legal ground rules on which I now anticipate I will rely in examining the facts of the particular jobs which are in dispute.

To say to ASPEP, "Yes, we will have a tripartite arbitration but it will be subject to the binding rule of Dr. Unterberger's May 25, 1978 interim award," is to give ASPEP nothing if the Unterberger interim award is as comprehensive a disposition of the central issues, at least as between Local 241 and RCA, as it has been assumed to be in the course of today's argument and the solidity of that assumption I think is the strength with which Local 241 insisted and ASPEP resisted the proposition that intervention by ASPEP should be conditional on acceptance of what had been determined before.

In a sense, I found the most telling claim made by Local 241 for maintaining the integrity of the Unterberger interim award the proposition

that had Dr. Unterberger gone the other way so that, in effect, Local 241 would have lost a substantial legal basis for its claim as to how the Morrestown jobs should be allocated, I think it would be hard to imagine Local 241 being able to come into this Court and say: All right. Having substantially lost that bipartite arbitration, we now want to convene a tripartite arbitration with Dr. Unterberger's award discarded or at least relegated to non-binding status.

I think the Local 241 argument is valid so far as it goes but it does not go far enough I think for two reasons: One, again, is that whatever victory Local 241 registered as against RCA in the Unterberger interim award, it, by definition, was not a victory as against ASPEP because ASPEP was not a party to that bipartite arbitration.

The other ground of limitation for that substantial argument by Local 241 is that Local 241 elected a bipartite arbitral process, namely, the process contemplated by its collective bar-

gaining agreement, and presumably it could have chosen to complete itself, that is to say, to ask for the invocation of a tripartite arbitral proceeding.

Local 241 has argued strenuously that RCA has been laggard in coming on strong in joining ASPEP's hue and cry for a tripartite arbitral proceeding. Local 241, in effect, would paint RCA into the corner which the Ninth Circuit placed that unhappy company in that Louisiana case.

Well, if we merely look at the chronology, I think it's clear that RCA has not come and asked for tripartite arbitration after two awards were outstanding against it. There isn't as yet even one award, though there may be thought to be something close to one in Local 241's perception of the matter. So I don't think we have anything comparable with the Ninth Circuit decision yet.

I have already indicated that I have some problem about accepting the Ninth Circuit's view of the very case which it decided but nothing be-

fore me calls on me to have the impertinence to reject the wisdom of the Ninth Circuit. I am a little dubitante about that case on its own facts and those facts certainly are not these facts here.

In any event, as I see the case before me, it is one in which this Court's aid has been properly invoked by ASPEP as the initial plaintiff without regard to RCA's position.

The fact that RCA has chosen to counterclaim and crossclaim as it has does not seem to me to add weight to the jurisdiction that is already mine. In some sense, RCA's position adds to the equitable strength of ASPEP's claim but the disposition I am going to make of this case does not turn on RCA's position one way or another.

My conclusion is that ASPEP's motion for summary judgment will be granted. I will direct that the defendants, Local 241 and RCA, proceed with ASPEP to continue the arbitration which is in progress but on a tripartite basis.

Moreover, I will direct that the arbitration

from here forward be conducted by the arbitrator on the premise that Dr. Unterberger's interim award of May 25, 1978, is open to reexamination, that is to say, is not binding on ASPEP or, indeed, on either of the other parties to the tripartite arbitration.

It may be said that in some sense RCA derives a windfall unknown to res adjudicata but itself now being out from under the binding effect of the interim award by Dr. Unterberger but it seems to me very difficult to contemplate proceeding with an arbitration in which there would be law of the case for one party but not for the other two parties.

Now, in directing that Dr. Unterberger's May 25, 1978 interim award, the Sidell award on which it depends, not be treated as law of the case for the balance of this arbitration I do not mean for a moment to suggest that the arbitrator cannot look to Unterberger and Sidell for guidance. They retain such precedential value as the arbitrator may properly wish to assign to

them. They are simply not to be treated as outside the realm of further controversy.

In short, ASPEP is to come into this arbitration free to raise such issues as appropriately in the arbitrator's view go to a proper resolution of the apparently competing claims of two unions, each of which has a collective bargaining agreement with the employer, RCA.

Needless to say, the freedom which ASPEP has pursued those issues carries with it the cognate freedom of RCA and of Local 241 to pursue with the arbitrator's guidance all those issues.

It is my intention to enter a very brief written order in which I will try to say in a couple of sentences what you have been so patiently listening to for approximately an hour now.

(Whereupon court is adjourned)

APPENDIX D

C E R T I F I C A T E

I, Michael Feuer, C.S.R., Official Court Reporter in and for the United States District Court, Eastern District of Pennsylvania, do hereby certify that the foregoing is a true and accurate transcript of my stenographic notes taken in the matter of ASPEP versus Local 241 and RCA, on February 13, 1980.

MICHAEL FEUER, C.S.R.
Official Court Reporter